

TAMAR C. STEIN (STATE BAR NO. 78311)
JAMES R. REPKING (STATE BAR NO. 218134)
KATHRYN J. PARADISE (STATE BAR NO. 260725)
COX, CASTLE & NICHOLSON LLP
2049 Century Park East
28th Floor
Los Angeles, CA 90067-3284
Telephone: (310) 277-4222
Facsimile: (310) 277-7889
E-mail: tstein@coxcastle.com
jrepking@coxcastle.com
kparadise@coxcastle.com

Attorneys for Petitioner MALIBU LA PAZ RANCH, LLC

STATE WATER RESOURCES CONTROL BOARD

MALIBU LA PAZ RANCH, LLC,

Petitioner,

vs.

REGIONAL WATER QUALITY CONTROL
BOARD, LOS ANGELES REGION,

Respondent.

**PETITION FOR REVIEW OF FINAL
ACTION BY A REGIONAL BOARD AND
REQUEST FOR HEARING**

(Water Code § 13320)

INTRODUCTION

Petitioner Malibu La Paz Ranch, LLC ("La Paz") seeks review of the February 4, 2010, final action of the California Regional Water Quality Control Board—Los Angeles Region ("Regional Board") denying La Paz's Application/Report of Waste Discharge ("Application" or "ROWD") by issuing so-called Waste Discharge Requirements, the *only* provision of which prohibits La Paz from discharging waste from its project. The Regional Board's Order, No. R4-2010-022, is attached as Exhibit 1.

La Paz's project ("Project") is a commercial retail, restaurant and office facility located in the Civic Center Area of the City of Malibu ("City"). It has the lowest floor area ratio in the

Civic Center. La Paz is a state-of-the-art project. La Paz will treat the wastewater generated on site to Title 22 standards, then recycle and beneficially use 100% of the treated wastewater for on site in-building toilet reuse and landscape irrigation. Its irrigation water demands are based upon the plants proposed and their specific evapotranspiration (ET) and efficiency rates; its landscaping pallet is derived from the Department of Water Resource's (DWR) landscape guide. In order to accommodate excess water in wet weather, La Paz is providing an 800,000 gallon underground storage tank, where the wet weather water can be stored. La Paz's studies show that in the wettest El Niño year, La Paz would have to store 700,000 gallons, leaving 100,000 gallons of contingency capacity.

Under normal operating conditions, La Paz will be a zero discharge project. If there is any off-specification discharge (reclaimed water that meets the standards of the Basin Plan but falls short of Title 22 standards), it will be discharged via drip irrigation as mandated by the California Department of Public Health (CADPH). On July 23, 2009, the CADPH approved La Paz's system as set forth in La Paz's final Title 22 Engineering Report, which is not conceptual, but based on working drawings. (Exhibit 2.) La Paz has submitted many studies proving it will have no offsite impacts, *i.e.* no impacts on neighboring or downgradient properties, hence no impact on assimilative capacity. These studies include numerous geological and soil studies (including nine geology reviews by the City), hydrogeology studies (including five hydrogeology reviews by the City), and transient groundwater mounding analyses, and five environmental health reviews.

Put simply, La Paz's effluent is treated to Title 22 standards, has 100% water reuse, will not raise groundwater levels, will not impact adjacent or downgradient properties, will not contribute to nutrient pollution in the Civic Center, and complies with all existing water quality objectives in the Basin Plan.

Indeed, the Regional Board's Supplemental Technical Memo for the February 4 hearing states at Recital D:

"Staff has no concerns with the water quality of the effluent from this project."

La Paz is a model project yet the Regional Board for months adamantly refused to schedule it for a hearing, always complaining that La Paz's Application was not "complete" even though La Paz had submitted everything the Regional Board asked for. La Paz believes it was delayed, and ultimately effectively denied, so the Regional Board could enact and enforce against La Paz the prohibition it adopted on November 5, 2009. However, Water Code § 13245 vests approval of the prohibition solely and only in the State Water Resources Control Board ("State Board"), which has not yet acted on it. Therefore, it is not yet known whether, or in what form, it might become law. However, the prohibition's lack of legal effect has not deterred the Regional Board from enforcing it.

Finding 19 of the Regional Board's Order sums up its determination to enforce the prohibition, in contravention of the jurisdiction of the State Board:

"The Regional Board believes it would be both inconsistent with the intent of the prohibition, and would constitute a waste of resources to allow individual dischargers to construct systems that the Regional Board has determined should be phased out."

Finding 25 of the Order states flat out **"This prohibition applies to La Paz."**

As hereafter shown in this Petition, the Regional Board's Findings are not supported by substantial (or any) evidence in the record and violate other principles of law.

La Paz therefore asks the State Board to accept this Petition, hear its Application/ROWD on the merits, issue appropriate waste discharge requirements for its Project, and declare that its Project is a no net discharge or no discharge project.

The bottom line is that La Paz wants a fair hearing.

PETITION ALLEGATIONS

La Paz, in accordance with 23 Cal. Code Regs. (hereafter "CCR") § 2050, alleges the following:

1. Name and Address of the Petitioner:

Malibu La Paz Ranch, LLC
c/o Christopher M. Deleau
Schmitz & Associates, Inc.
5234 Chesebro Rd., Ste. 200
Agoura, CA 91301
Telephone: (818) 338-3636
Email: cdeleau@schmitzandassociates.net

Petitioner's counsels' address, telephone number and email address are listed in the caption hereof.

2. Action of the Regional Board Being Petitioned:

By this Petition, La Paz appeals from the Regional Board's Order No. R4-2010-022, entitled "Waste Discharge Requirements Prohibiting Discharge From the Malibu La Paz Ranch, LLC."

3. Date of Regional Board Action:

Order No. R4-2010-022 was approved by the Regional Board on February 4, 2010.

4. Statement of Reasons Why the Action of Regional Board was Inappropriate or Improper:

La Paz's Project is, in actuality, two substantially similar commercial retail, restaurant and office developments to be located on three parcels of land totaling 15.29 acres in the City. Both were approved by the City on November 18, 2008. However, only one of the projects will be built; whichever is built will use the system proposed to the Regional Board in the ROWD. Therefore, the word "Project" will be used in the singular herein. La Paz's Project is a model project, as described in the Introduction to this Petition and substantiated in the administrative record. It is representative of the types of projects that must be encouraged and approved in order for the State of California to meet the Governor's goal of 20% reclaimed water use statewide by the year 2020.

La Paz submitted its Application to the Regional Board on December 21, 2006. La Paz did not receive a written response to its Application until February 28, 2007, when a staff member requested a processing fee.

Finding 3 of the Regional Board's Order implies that over the following 31 months La Paz haphazardly modified its Application, thus delaying its processing. Nothing could be further from the truth. Finding 3 omits many key dates and much significant information, which information is found at page 3 of La Paz's responses to the Order, submitted to the Regional Board on January 19, 2010. (Exhibit 3.) Contrary to the implication of Finding 3, all revisions to La Paz's Project were made in response to comments and concerns of the Regional Board. With those concerns in mind, on January 8, 2008 La Paz submitted the design of its no net discharge Title 22 Wastewater Treatment System. The Executive Officer promised to expedite its processing.

On January 15, 2008, the Regional Board issued its first Notice of Incomplete Application. (Exhibit 4.) From January 17 until February 15 La Paz's representatives met with staff and submitted additional materials. On February 15, 2008, the Regional Board issued another Notice of Incomplete Application. (Exhibit 5.)

The Board's February 15, 2008 Notice identified five items required in order for the Application to be complete:

- A Title 22 Engineering Report approved by the CADPH.
- Modification of the treatment design to meet the Plumbing Code assumptions for water use, though the ROWD was for lower discharge volumes.
- Documentation of the operation of existing irrigation systems to confirm evapotranspiration (ET) estimates.
- Accommodation of waste discharge from the project in the sub-surface after consideration of the worst case discharges from the Malibu Lumber Yard and Legacy Park projects.
- Specification of odor control features.

The Regional Board received all of these items, as hereafter noted. Project engineer Lombardo Associates, in response to the February 15 Notice, submitted a substantial amount of further information. On April 2, Lombardo Associates submitted the April 1, 2008 La Paz Wastewater Management Plan which, among other things, addressed the ET analysis and transient groundwater mounding modeling issues as requested in the Notices of Incomplete Application. Lombardo Associates understood from the Regional Board that conceptual approval from the CADPH, rather than a fully detailed Title 22 Engineering Report, would be sufficient for completion of the Application. This understanding is consistent with that expressed by Regional Board staff member Elizabeth Erickson. (Exhibit 7.) Lombardo Associates obtained CADPH's conceptual approval on May 30, 2008. (Exhibit 6.)

On June 11, 2008, Executive Officer Egoscue sent La Paz a letter advising that staff would no longer process the Application until such time as La Paz's CEQA review was completed and approved by the City. (Exhibit 8.) The letter stated, "[w]e will begin our review of your ROWD when La Paz's CEQA [review] is approved by the City." (*Id.*) Therefore, the City's CEQA review was the only step left in order to complete the Application and commence processing. (*See also* Exhibit 7.)

On November 10, 2008, the City approved the La Paz Project and certified the La Paz EIR. The certification of the EIR completed the CEQA review by the City. On December 2, 2008, La Paz representative Christopher M. Deleau sent to Ms. Erickson an email stating:

"La Paz has submitted all requested materials for application completion. Certification of the EIR by the City of Malibu was the last item required for application completion." (Exhibit 11.)

Mr. Deleau attached the Notice of Determination to the correspondence and thus completed La Paz's submittal to the Regional Board. (*Id.*) The Regional Board did not respond to this submittal.

Pursuant to the PSA, the Regional Board was required to advise La Paz in writing within 30 days (before January 2, 2009) whether it agreed that La Paz's Application was complete. (Govt. Code, § 65943 (b), *see also* 23 CCR § 3761.) This did not happen. On February 12,

2009, La Paz's counsel wrote to Executive Officer Egoscue and explained that La Paz's Application had been deemed complete as a matter of law. (Exhibit 10.) On March 11, 2009, Jeffery Ogata, counsel to the Regional Board, responded with another Notice of Incomplete Application, stating that La Paz had not submitted all of the information set forth in the previous Notices of Incompletion. (Exhibit 13.) However, under California law, Mr. Ogata's response had no legal effect because the Application was already deemed complete.

In the meantime, the Regional Board refused to schedule a hearing until La Paz again modified its Application to accede to staff's interpretation that all subsurface disposal of off specification flows must be eliminated, even on an emergency basis as mandated by the CADPH, an interpretation with which Lombardo Associates strongly disagreed. (Exhibits 12 and 13.)

On June 16, 2009, La Paz notified the Regional Board in accordance with the PSA, that La Paz intended to provide Public Notice pursuant to Govt. Code § 65956(b) that its Application would be deemed approved as a matter of law if the Regional Board did not hold a hearing within 60 days and approve or disapprove the Application. (Exhibit 14.)

On June 22, 2009, La Paz's counsel received an email from the Regional Board's counsel Mr. Ogata asking in what format La Paz would prefer that the Regional Board send La Paz the mailing list for the Public Notice. (Exhibit 16.) La Paz's counsel requested that the Regional Board send the list in the fastest possible format. In spite of counsel's letter, the Regional Board refused to provide the list. On June 23, the Executive Officer wrote to La Paz "[w]e continue to believe that La Paz has not completely responded to our requests for information that would allow us to conclude that La Paz's application is complete." and "[g]iven the current resource limitations at the Regional Board, we intend to place the permit application on the agenda of the February 2010 Board hearing." (Exhibit 17.)

On July 2, 2009, La Paz distributed the Public Notice. (Exhibit 15.) Pursuant to Govt. Code § 65956(b), the Public Notice stated that the ROWD would be deemed approved as a matter of law if the Regional Board had not held a hearing by August 31, 2009 and approve or disapprove the Application.

On July 2, 2009, after the Public Notice was given, Ms. Egoscue notified La Paz that it was "proceeding illegally" and "we will not bring this incomplete application to the Regional Board for action prior to February 2010." (Exhibit 18.)

It was clear that no matter what La Paz did, the Regional Board had no intention of complying with its legal obligation to approve or disapprove the Application by August 31, or at any time prior to approval of the proposed prohibition, for which it had held a CEQA Scoping Meeting in January 2009.

On July 8, 2009, La Paz's counsel responded to Ms. Egoscue, stating that the Regional Board was wrong as a matter of fact and law, pointing out that the Regional Board "intends to illegally delay a hearing for at least another seven months, until February 2010, at the earliest." (Exhibit 19.)

On July 23, 2009, La Paz received CADPH approval of its final Title 22 Engineering Report. (Exhibit 2.) Even though La Paz had expended substantial sums of money in the preparation of the Title 22 Engineering Report and had also expended substantial time and money in coordinating with the Regional Board in providing the Title 22 Engineering Report, the Regional Board refused to review it until La Paz agreed to modify its ROWD to exclude any and all emergency discharge, even that mandated by Title 22.

The Regional Board adamantly continued to refuse to schedule a hearing or otherwise consider the Application, as Executive Officer Egoscue stated unequivocally in Exhibits 17 and 18.

As noted, pursuant to the PSA, the Regional Board was *required* to tell La Paz in writing within 30 days of a submittal whether it agreed that the Application was complete and if not, what remained to be provided. (Govt. Code, § 65943 (b)). There is no dispute that California law requires the Regional Board to comply with the PSA. (See *e.g.* 23 CCR § 3761.) If no response is made, the Application is deemed complete as a matter of law. This is not a bell that can be unrung, as the Regional Board attempts to do in Findings 3, 4, 13, 14, 20, 22, 26 of its Order. The failure to respond conclusively means the Application is complete and a hearing to

approve or disapprove the Application must be held within 180 days or within 60 days if Public Notice is given after the 180 days runs.

On July 23, 2009 La Paz filed its petition with the State Board for review of the failure of the Regional Board to act on its Application.

On August 31, 2009, La Paz's Application was deemed approved as a matter of law because the Regional Board failed to hold a hearing.

The Regional Board's pattern of deliberate delay was clearly designed to force La Paz into the teeth of the Regional Board's proposed prohibition on all private wastewater treatment systems within the City's Civic Center Area. On November 20, 2008, the Regional Board held a hearing to consider terminating its MOU with the City allowing private wastewater treatment systems in the Civic Center Area. In January 2009, the Regional Board had held a CEQA Scoping Meeting with respect to a proposed prohibition. Finally, in September 2009, the Regional Board issued the text of its proposed prohibition, its Substitute Environmental Documentation and Technical Reports, required public comments by October 8, and noticed a public hearing. The proposed prohibition included an exemption for no net discharge systems such as La Paz's. However, on October 18, after the close of public comment, the Regional Board issued new Substitute Environmental Documentation and a revised Resolution which eliminated the no net discharge exemption.

Meanwhile, on October 7, 2009, La Paz's Petition to the State Board was accepted as complete and opened for comment. Thereafter, the State Board received numerous letters of support for La Paz's Project from persons and entities as diverse as the City of Malibu, Senators Dave Cogdill and Mark Wyland, Assemblymembers Jean Fuller, Tom Berryhill, Joel Anderson, Cameron Smyth, Van Tran, Anthony Adams, Diane Harkey, Audra Strickland, and Mike Villines, the Los Angeles/Orange Counties Building and Construction Trades Council, the California Business Properties Association, James Kreiss (USEPA expert) and Concerned Citizens of Malibu. (Exhibit 20, collectively.)

On November 5, 2009, the Regional Board adopted Resolution No. R4-2009-007, amending the Basin Plan to prohibit discharges from onsite wastewater discharge systems in the Malibu Civic Center Area. The prohibition is not law because its approval is solely within the purview and jurisdiction of the State Board. (Water Code § 3245.)

Finally, the Regional Board scheduled a hearing on La Paz's Application for February 4, 2010. On February 4, 2010, the Regional Board "approved" a WDR for La Paz. However, the Regional Board's so-called "approval" was in fact a denial. The *only* WDR imposed was that "La Paz was prohibited from discharging waste from its project" (Exhibit 1.) On February 26, 2010, the State Board dismissed La Paz's pending petition for inactivity because the Regional Board had acted at last.

The Order issued by the Regional Board is riddled with legal deficiencies and factual inaccuracies. (See Exhibit 2; Memorandum of Points and Authorities.)

The following summarizes some of those deficiencies and inaccuracies. Others have already been addressed in detail.

The Regional Board's action was contrary to law for the following principal reasons:

A. Failure to Adopt Appropriate Waste Discharge Requirements.

Water Code §132623 and 23 CCR § 2208 require the Regional Board to adopt "appropriate waste discharge requirements" as soon as possible after a permit is deemed approved under the PSA. Thus, approval under the PSA did not give La Paz a free pass as the Regional Board was still required to hold a hearing. The Regional Board's Order concedes at Findings 15 and 16 that the February 4 hearing was the 23 CCR § 2208 hearing. However, the sole WDR issued *prohibits* any discharge whatsoever. This is not the required adoption of "appropriate waste discharge requirements."

B. Illegal Enforcement of the Prohibition.

The Regional Board has illegally enforced its Resolution No. R4-2009-007, adopted on November 5, 2009, amending the Basin Plan to prohibit discharges from onsite wastewater disposal systems in the Malibu Civic Center Area. Findings 10, 17, 18, 19 and 25 all rely on enforcement of the terms of the prohibition as the reason La Paz should not be allowed to discharge. The Regional Board is enforcing the prohibition in contravention of the authority and jurisdiction of the State Board. (Water Code § 3245.)

C. Decision Against La Paz for Exercise of Its Right to Petition.

La Paz does not believe that any Regional Board member intended to base his or her vote on an invalid ground. However, the Executive Officer advised the Board "Right now what is at stake and what is on the table is your authority to discharge this facility. . . . [the ROWD] ceased to become an engineering argument or a technical argument when they asserted they had a right to permit themselves." (Exhibit 22, Transcript p. 55, l.14-15; p. 56, l. 4-6.) The Regional Board's legal counsel Jeffery Ogata stated, "There are additional options, but we feel strongly that this Board must take some kind of an action to protect this jurisdiction because as Ms. Egoscue said, this is now a matter of law We do this as a legal issue, not a technical issue." (Exhibit 22, Transcript p. 75, l. 16-19, l. 22-23.) With this guidance, it is no wonder that Board members relied on the fact that La Paz had asserted the PSA and petitioned to the State Board as substantial or motivating factors in their decision effectively to deny the ROWD. (Exhibit 22, Transcript p. 70, l. 23-25; p. 71, l. 1-3, 8-11; p. 72, l. 5-20; p. 82, l. 21 -24; p. 83, l. 17, p. 85, l. 1-2, p. 87, l. 4-5.) See Memorandum of Points and Authorities for the numerous cases holding such a denial violates the applicant's right to due process, equal protection and a fair hearing, as well as its First Amendment rights.

D. Denial of A Due Process and Equal Protection.

The Regional Board denied La Paz a fair hearing and treated La Paz differently from other similarly situated projects, such as the Malibu Lumber Yard, when there was no basis for the differential treatment. See Memorandum of Points and Authorities.

E. Violation of PSA.

The Regional Board improperly failed to find La Paz's Application was complete on January 1, 2009, at the latest, and deemed approved as a matter of law on August 31, 2009 pursuant to the PSA. *See* preceding discussion; Memorandum of Points and Authorities.

F. The Order Is Not Supported By Substantial Evidence.

The Regional Board failed to bridge the "analytic gaps" among (i) the evidence that was in the record, (ii) the Findings it approved at the February 4 hearing, (iii) the goals of the laws that it is charged with implementing, and (iv) its ultimate decision as reflected in the so-called Waste Discharge Requirement prohibiting any discharge whatsoever by La Paz. The principal defects are:

1. La Paz Will Not Elevate the Water Table. (Finding 4g.) *See*, Transcript (Exhibit 22) p. 16, 1.13-15; p. 27, 1.10-22; p. 32, 1.14 through p. 34; 1.20; p. 36, 1.18-25; pp. 37 through 40; Exhibit. 2, February 3, 2010 Response of Lombardo. (Exhibit 21.)
2. The Effluent Volumes Are Not Larger Than The System's Design Capacity. (Finding 3g.) *See* preceding discussion; February 3, 2010 Response of Lombardo. (Exhibit 21.); La Paz's Response to Order (Exhibit 2); Transcript (Exhibit 22) p. 28, 1.13-25; p. 29; p. 36, 1.23-25; pp. 37 through 40.
3. La Paz Has No Impact On Assimilative Capacity. (Findings 4c, 11, 24, 26.) *See*, April 2008, July 2008 and May 2009 Engineering Reports, Appendix D of Wastewater Management Plan and La Paz Wastewater Engineering Reports which include, for analytical purposes, the transient mounding analysis of a continuous discharge that would be associated with excess irrigation and off-specification discharge.

La Paz has provided the Regional Board with extensive hydrogeologic data and computer simulations that illustrate that minimal groundwater mounding would occur with emergency discharge or excess irrigation for salts management. The extensive hydrogeologic modeling was performed by Fugro and reviewed by the City of Malibu's independent hydrogeologists, using

extensive geologic data. Summaries from the extensive Geologic and Hydrogeologic Reports, are included in the Wastewater Report Appendices. *See*, also, preceding discussion. (Transcript (Exhibit 22) p. 16, 1.15-20; p. 32, 1.9 through p. 34; 1.20; p. 43, 1.11 through p. 44, 1.4.)

4. La Paz Does Not Rely On Voluntary Conservation Measures. (Transcript (Exhibit 22), p. 16, 1.23-25.) The Regional Board's contention that La Paz relies on voluntary conservation is simply untrue. The Regional Board has cited nothing in the record to support it because there is nothing in the record that does. *See*, Lombardo, February 3, 2010 Response. (Exhibit 21.)

5. Salt Management. (Transcript (Exhibit 22), p. 17, 1.3-4). Soil salt management is necessary for *any* irrigation project. The uncontroverted evidence in the record shows that the La Paz Project's groundwater salt management is to be addressed during design, as stated in the Project conditions approved by the City, and integrated with the Basin-wide Salt Management Plans that are required by the State Board to be developed.

Using the criteria in the State Board's Water Recycling Policy, La Paz would consume <10% of the salt capacity of the Malibu Civic Center aquifer. Pursuant to the State Board's Water Recycling Policy, individual projects do not require salt removal when salt contribution is <10% of Basin capacity. *See*, Lombardo February 3, 2010 Response. (Exhibit 21.)

6. There is No Poor Quality Water. (Findings 5a; Transcript (Exhibit 22) p. 15, 1.15-17; p. 17, 1.5-7). At the February 4 hearing, staffer Ms. Erickson stated there was a concern regarding "non-sewered destination for water of poor quality." Her statement blatantly contradicts the Regional Board's own Supplemental Technical Memo, prepared for the February 4 hearing, which states at Recital D: "*Staff has no concerns with the water quality of the effluent from this project.*" The uncontroverted evidence in the record shows there is no poor quality water. The Wastewater Engineering Reports analyze the impact of 20 days of discharge, the required capability mandated by CADPH in Title 22. The Reports state that discharge durations are expected to be short, typically 2 to 3 days. The frequency of discharges is less than two times per year, as the treatment system has redundancy to obviate the

need for discharge. The likely causes for any excursions would be failure to meet turbidity and coliform standards, which is not a public health issue. Discharge to drip dispersal would treat for any bacterial issues. The water to be discharged is reclaimed water that is classified for unrestricted use. For example, such water could be used to vegetate edible crops. It is not water of poor quality, as readily acknowledged in the Supplemental Technical Memo. *See, e.g.* February 3, 2010 Lombardo Response. (Exhibit 21.)

7. There Is A Clear and Final Title 22 Engineering Report Approved By CADPH. (Finding 5). The uncontroverted evidence in the record shows that on July 23, 2009, the CADPH approved the Malibu La Paz Development Engineering Report for the Production, Distribution and Use of Title 22 Disinfected Tertiary Recycled Water. (Exhibit 2.) The CADPH approval states:

“The Department of Public Health – Drinking Water Program (Department) has reviewed the Malibu La Paz Development Engineering Report for the Production, Distribution and Use of Title 22 Disinfected Tertiary Recycled Water (Report), dated May 6, 2009, describing the treatment and reuse of disinfected tertiary recycled water for the La Paz Development in the City of Malibu. The Report follows the Department’s guideline for developing a recycled water engineering report and the proposed wastewater treatment technology described in the Report is an accepted treatment technology by the Department.”

The Regional Board’s contention that CADPH’s approval lacks certain details is disingenuous, as the Regional Board’s requested details must be, and are, prepared as part of final design *after* issuance of WDRs/WRRs. The Regional Board retains its authority to approve the construction plans to ensure that the matters of concern are properly addressed.

8. La Paz’s Application Is Complete As A Matter of Law. (Findings 13, 14, 22, 26). *See*, preceding discussion; Transcript (Exhibit 22) p. 32, 1.20 through p. 43, 1.21; Memorandum of Points and Authorities. The issue of whether the Application was complete under the PSA is somewhat of a red herring. Even assuming *arguendo* that the Application was not complete under the PSA, the bottom line is that the Regional Board received all the data and information it asked for.

5. How Petitioner Is Aggrieved

Petitioner is aggrieved by the Regional Board's action because it is prohibited from discharging any waste whatsoever from its project, even CADPH mandated emergency discharge under Title 22. The Regional Board's final action disingenuously allows La Paz to file "another ROWD." However, La Paz's ROWD on file is complete and contains all material requested by the Regional Board, so in fact there is no other ROWD to be filed.

6. The Action Requested By the State Board

Petitioners request the State Board to accept this Petition, conduct a hearing on the merits, approve appropriate waste discharge requirements for the La Paz Project, and declare the La Paz Project to be a no net discharge or no discharge project.

La Paz is simply asking for a fair hearing.

7. Statement of Points and Authorities

See Memorandum of Points and Authorities, attached hereto and incorporated into this Petition.

8. Statement Concerning Distribution of Petitions

This Petition has been sent by electronic and U.S. mail to the Regional Board, c/o its Executive Officer Tracy Egoscue and to the Regional Board's legal counsel, Jeffery Ogata.

9. Statement Regarding the Issues and Objections Raised to the Regional Board

The issues and objections raised in this Petition were raised before the Regional Board.

10. Request for Hearing

Petitioner requests that the State Board conduct a hearing in this matter. The bulk of the Administrative Record supporting this Petition has already been assembled and was lodged by the Regional Board on November 16, 2009, as the administrative record for La Paz's Petition regarding the Regional Board's inactivity. Only the record from November 2009 through the February 4, 2010 hearing need be newly assembled.

11. Reservation of Rights to Amend this Petition and the Accompanying Points and Authorities and to Supplement the Administrative Record

Petitioner reserves its right to amend this Petition and accompanying Points and Authorities and to petition the State Board to augment and supplement the administrative record. These reservations are appropriate and necessary in light of the above-stated actions of the Regional Board, and the Regional Board's ongoing pattern of delay towards La Paz.

CONCLUSION

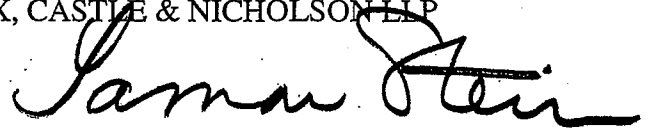
La Paz respectfully requests that the State Board grant this petition, hold a hearing on the merits of La Paz's Application, approve appropriate Waste Discharge requirements for the La Paz Project, and declare that the La Paz Project is a no net discharge or no discharge project.

DATED: March 8, 2010

Respectfully submitted,

TAMAR C. STEIN
JAMES R. REPKING
KATHRYN J. PARADISE
COX, CASTLE & NICHOLSON LLP

By:



Tamar C. Stein
Attorneys for Petitioner MALIBU LA PAZ
RANCH, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. La Paz's Application Was Deemed Approved As A Matter Of Law

La Paz's Application was deemed approved as a matter of law on August 31, 2009, pursuant to the Permit Streamlining Act, Gov't Code § 65920 *et seq.* ("PSA").

The PSA required the Regional Board to determine, in writing, within 30 days of submission, whether the La Paz's Application was complete. (Govt. Code, § 65943(b); *see also* 23 CCR § 3761.) Since the Regional Board did not respond to La Paz within 30 days, La Paz's Application was deemed complete as of January 2, 2009. (*Id.*) The Regional Board had 180 days from January 2, 2009 to act on La Paz's Application. (Govt. Code, § 65952 (a)(2); 23 CCR § 3760.)

When an agency fails to provide a hearing within the required 180 days, the PSA allows the applicant to provide public notice that the application will be deemed approved. (Govt. Code § 65956(b).) On June 16, 2009, La Paz provided public notice that its Application would be deemed approved if the Regional Board did not act by August 31, 2009 to approve or disapprove it. The Regional Board failed to act, and La Paz's Application was deemed approved as of August 31, 2009.

La Paz has been the subject of continually expanding requests for information throughout the Application process. The law is clear that, once an application has been deemed complete, further untimely requests for additional information do not restart the time period for acting on the application. (*Orsi v. City Council* (1990) 219 Cal.App.3d 1576, 1584.) Therefore, the Regional Board's requests for further information after January 2, 2009 are irrelevant. (*Id.*) The PSA does not permit an agency to repeatedly change the rules to delay processing an application. In fact, the PSA requires agencies to compile a publicly-available list of all information required to complete an application. (Gov. Code, § 65940 (a).) Not only has the Regional Board not created such a list, it has repeatedly asked for more information once La Paz had responded to its earlier requests. The PSA does not allow an agency to continually expand requests as a pretext to keep the application incomplete.

La Paz provided the Regional Board with everything they asked for, complying with demands above and beyond what has been required of other applicants. La Paz continued to submit information up until the February 4, 2010 hearing before the Regional Board. (*See, e.g., Lombardo Response, Exhibit 21.*) Regardless, staff continues to make the unfounded claim that La Paz's Application is incomplete and the Board cannot issue appropriate waste discharge requirements.

II. 23 Cal Code Regs § 2208 Mandates the Regional Board to Issue Appropriate Waste Discharge Requirements

The Regional Board was obligated to issue appropriate WDRs to La Paz yet failed to do so. The Regional Board conceded that La Paz's Application was complete by holding a hearing pursuant to 23 CCR § 2208. Because the Application was approved as a matter of law on August 31, 2009, the only authority by which the Regional Board could consider the matter was under 23 CCR § 2208 which states, in pertinent part, "whenever a project is deemed approved pursuant to [the PSA], due to a regional board failure to act on a report of waste discharge, the applicant may discharge waste as proposed in the report of waste discharge until such time as the regional board adopts waste discharge requirements applicable thereto" and "[t]he regional board shall adopt appropriate waste discharge requirements pursuant to California Water Code Section 13263 or waive the adoption of such requirements pursuant to Section 13269 as soon as possible for any project deemed approved."

Pursuant to 23 CCR § 2208, the Regional Board had no discretion whether to adopt the WDRs. The regulation mandates that the Regional Board "shall adopt appropriate waste discharge requirements" or "waive the adoption of such requirements." (23 CCR § 2208(b).) The Water Code reaffirms that "'shall' is mandatory and 'may' is permissive." (Water Code, § 15.) Regulatory language is afforded its plain meaning; therefore, "shall" means the adoption or waiver of WDRs is mandatory, not discretionary. (*See Sustainability of Parks, Recycling, and Wildlife Legal Defense Fund v. Count of Solano Dept. of Resource Management* (2008) 167 Cal.App.4th 1350, 1359; *National Paint & Coatings Ass'n, Inc. v. South Coast Air*

Quality Management District (2009) 177 Cal.App.4th 1494, 1514-1515.) Moreover, § 2208 uses both “may” and “shall” in prescribing action by the Regional Board, further evidence that the drafters of § 2208 intended for “shall” to mandate action, as opposed to the permissive use of “may.” (See *People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1298.) Therefore, the Regional Board’s discretion is limited to determining whether to adopt or waive the WDRs; it had no power to functionally deny La Paz’s Project by issuing a WDR prohibiting discharge.

The Regional Board’s Order appears to rely on the provision in 23 CCR § 2208 (a) which states that “no such discharge of waste shall create a vested right to continue such discharge.” (Exhibit 1, ¶ 15.) However, this provision does not mean that the Regional Board can act arbitrarily in violation of applicable legal standards. Further, the standard to be applied in this case is different than if the application had not already been deemed approved as a matter of law. Once a permit is issued, the power of the government agency to revoke the permit is limited. (See *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1530.) The permit is subject to a heightened standard and the permit can be revoked only if the permittee fails to comply with permit conditions or there is a compelling public necessity, such as that the use constitutes a nuisance. (*Id.*, citing *O’Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 158; see also *Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1294.) Furthermore, “in order to justify the interference with the constitutional right to carry on a lawful business it must appear that the interests of the public generally require such interference and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.” (*Bauer, supra*, 75 Cal.App.4th at 1294, *O’Hagen, supra*, 19 Cal.App.3d at 159.) In other words, whether the action “could be believed to be sufficiently necessary to the public welfare as to justify the impairment” to the property owner. (*Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 649.) For example, one justification would be if the use “creates a condition dangerous to the public health or safety.” (*Id.*) However, the Regional Board presented no evidence whatsoever that the La Paz facility will cause any

dangerous conditions and there are no grounds on which the Regional Board may revoke La Paz's approval as a matter of law.

Additionally, the Regional Board cannot circumvent the PSA by issuing WDRs under 23 CCR § 2208 which prevent any discharge. No matter how this is characterized, it is the functional equivalent of a denial. The Regional Board cannot interpret its regulations in a way which directly conflicts with the purposes of the PSA. "[A]dministrative interpretations must be rejected where contrary to statutory intent." (*Pacific Legal Foundation v. Unemployment Ins. App. Bd.* (1981) 29 Cal.3d 101, 111; *Land v. Anderson* (1997) 55 Cal.App.4th 69, 82.) It is also impermissible because it disregards the plain meaning of the PSA. (See *Robinson v. City of Yucaipa* (1994) 28 Cal.App.4th 1506, 1516; *Indian Springs, Ltd. v. Palm Desert Rent Review Bd.* (1987) 193 Cal.App.3d 127, 135.) The State Board should not permit the Regional Board to flout well-settled law by failing to comply with the provisions of the PSA and 23 CCR § 2208.

III. There Is No Evidence The La Paz Project Would Be A Nuisance

There is no basis for Finding 24 of the Regional Board's Order claiming that the La Paz Project would constitute a nuisance. (Exhibit 1.) La Paz's Project complies with all statutory criteria and, therefore, it cannot be a nuisance as a matter of law. "Nothing that is done or maintained under the express authority of a statute can be deemed a nuisance." (Civ. Code § 3482; *Carson Harbor Village v. Unocal Corp.* (C.D. Cal. 1997) 990 F.Supp. 1188, 1197 (finding discharges permitted by Regional Board cannot be a nuisance); *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1258 (same).)

In any event, neither the Regional Board's Order nor the record in this matter provides any evidence whatsoever that La Paz's Project will cause a nuisance. The law is clear that nuisances cannot be based solely on a fear of future injury. (See *Koll-Irvine Ctr. Prop. Owners Ass'n v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041-1042.) The proof that a nuisance will result cannot "cannot be speculative and must amount to more than the conclusory opinions of experts." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44

Cal.App.4th 1160, 1213, citing *Jardine v. City of Pasadena* (1926) 199 Cal. 64, 75.) “To establish a nuisance the plaintiff must demonstrate an actual and unnecessary hazard.” (*Beck, supra*, 44 Cal.App.4th at 1160; *People v. Oliver* (1948) 86 Cal.App.2d 885, 889-890.) Contrary to the statements in the Order, there is not a scintilla of evidence in the record that La Paz’s treatment facility would cause any harm or create a nuisance.

IV. La Paz Was Treated Differently Than Other Projects In The Civic Center Area

The Regional Board has denied La Paz due process and equal protection by improperly singling out La Paz for excessive and undue application demands. “The Equal Protection Clause ensures that ‘all persons similarly situated should be treated alike.’” (*Squaw Valley Dev. Co. v. Goldberg* (9th Cir. 2004) 375 F.3d 936, 944.) The Regional Board intentionally treated La Paz differently from other similarly situated applicants and there was no rational basis for the difference in treatment. This constitutes a denial of due process and of equal protection of the law. (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control District* (2003) 113 Cal.App.4th 597, 605.)

La Paz should be treated the same as other projects in the Civic Center Area, such as the Malibu Lumber Yard Project. Procedural due process “always requires a relatively level playing field, the ‘constitutional floor’ of a ‘fair trial in a fair tribunal,’ in other words, a fair hearing before a neutral or unbiased decision-maker.” (*Shaw v. County of Santa Cruz* (2009) 170 Cal.App.4th 229, 266; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.) “Biased decisionmakers are impermissible and even the probability of unfairness is to be avoided.” (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170.) “The broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor of assuring that such hearings are fair.” (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.) Basic principles of due process, equal protection and fairness require that the Regional Board treat all applicants the

same; here, the Regional Board failed to do so and La Paz was denied its constitutionally-guaranteed due process and equal protection.

V. The Regional Board Staff Unlawfully Retaliated Against La Paz

At the February 4, 2010 hearing, the Executive Officer and Regional Board counsel Mr. Ogata stated that the issuance of WDRs prohibiting any discharge was necessary for the Board to "protect its jurisdiction" because La Paz filed a petition to the State Board regarding its approval under the PSA. The Regional Board relied on this as a substantial or motivating factor in its decision.

It is illegal for a decisionmaker to retaliate against an applicant simply because it exercised its First Amendment rights of free speech and to petition the government. (See *Osborne v. Grussing* (8th Cir. 2007) 477 F.3d 1002; *Powell v. Alexander, supra*, 391 F.3d at 16-17.) This includes the right "to seek redress in the courts without fear that recourse to the law will make that citizen a target for retaliation." (*Powell*, 391 F. 3d at 16-17.) "[T]he Supreme Court has consistently recognized the right to petition all branches of the government, including the courts for redress of grievances as 'among the most precious of the liberties safeguarded by the Bill of Rights.'" (*Id.*, citing *Cal. Motor Transp. Co. v. Trucking Unltd.* (1972) 404 U.S. 508, 510; *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n* (1967) 389 U.S. 217, 222.)

The Regional Board's retaliatory motives for its decision is also a denial of equal protection. (*Carpinteria Valley Farms, Ltd. v. County of Santa Barbara* (9th Cir. 2003) 344 F.3d 822, 830 (plaintiff had cause of action when County staff imposed discriminatorily heightened development requirements); see also *Village of Willowbrook v. Olech* (2000) 528 US 562, 564; *Bullock v. City & County of San Francisco* (1990) 221 Cal.App.3d 1072, 1090-1091 (hotel owner had cause of action when City staff rezoned his property in retaliation for a prior lawsuit against the City).)

VI. The Regional Board Failed to Make Adequate Findings As Required By Law

The Regional Board did not comply with the law in issuing its Order and accompanying WDR prohibiting discharge. The Regional Board's decision and findings must be supported by substantial evidence in the record. (Code Civ. Pro. § 1094.5; *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1408-1409.) The Regional Board is obligated by law to "set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) The Regional Board has failed to do so. There is no evidence in the record, much less substantial evidence, supporting the factual and legal inaccuracies in the Regional Board's Order and issuance of the WDR prohibiting all discharge. Therefore, the Regional Board's Order cannot stand.

VII. Conclusion

Based on the foregoing, La Paz respectfully requests that the State Board grant this petition for review and hold a hearing on the merits of La Paz's Application, approve appropriate WDRs for the Project, and declare that the La Paz Project is a no net discharge or no discharge project.

PROOF OF SERVICE AND CERTIFICATION

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2049 Century Park East, 28th Floor, Los Angeles, California 90067-3284.



(FOR MESSENGER) My business address is Nationwide Legal, 316 West 2nd Street, Suite 705, Los Angeles, CA 90012.

On March 8, 2010, I served the foregoing document(s) described as **PETITION FOR REVIEW OF FINAL ACTION BY A REGIONAL BOARD AND REQUEST FOR HEARING** on ALL INTERESTED PARTIES in this action by placing ☐ the original ☐ a true copy thereof enclosed in a sealed envelope addressed as follows:

ServiceList

On the above date:



(BY ☐ U.S. MAIL/BY ☐ EXPRESS MAIL) The sealed envelope with postage thereon fully prepaid was placed for collection and mailing following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing set forth in this declaration. I am readily familiar with Cox, Castle & Nicholson LLP's practice for collection and processing of documents for mailing with the United States Postal Service and that the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business.



(BY FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE) I deposited the sealed envelope in a box or other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized carrier or driver authorized by the express carrier to receive documents.



(BY FACSIMILE TRANSMISSION) On March 8, 2010, at _____ a.m./p.m. at Los Angeles, California, I served the above-referenced document on the above-stated addressee by facsimile transmission pursuant to Rule 2.306 of the California Rules of Court. The telephone number of the sending facsimile machine was (____) ____-____, and the telephone number of the receiving facsimile number was (____) ____-____. A transmission report was properly issued by the sending facsimile machine, and the transmission was reported as complete and without error. Copies of the facsimile transmission cover sheet and the transmission report are attached to this proof of service.



(BY E-MAIL OR ELECTRONIC TRANSMISSION) - On _____, at 2:15 a.m./p.m. at Los Angeles, California, I served the above-referenced document by electronic mail to the e-mail address of the addressee(s) pursuant to Rule 2.260 of the California Rules of Court. The transmission was complete and without error and I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.



(BY PERSONAL DELIVERY) By causing a true copy of the within document(s) to be personally hand-delivered to the office(s) of the addressee(s) set forth above, on the date set forth above.



(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

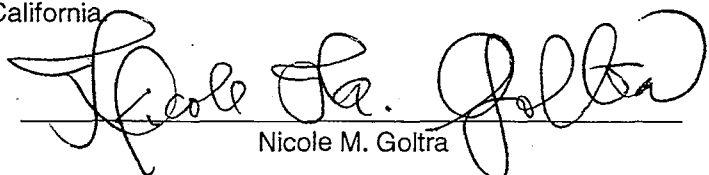


(FEDERAL ONLY) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I hereby certify that the above document was printed on recycled paper.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 8, 2010, at Los Angeles, California



Nicole M. Goltra

Service List

Jeannette L. Bashaw
Legal Analyst
State Water Resources Control Board
Office of Chief Counsel
1001 I Street
Sacramento, CA 95814
Email: jbashaw@waterboards.ca.gov

Jeffery M. Ogata, Esq.
Senior Staff Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814
Email: JOgata@waterboards.ca.gov

Tracy J. Egoscue
Executive Officer
Los Angeles Regional Water Quality Control Board
320 W. 4th Street, Suite 200
Los Angeles, CA 90013
Email: tegoscue@waterboards.ca.gov

EXHIBIT 1



California Regional Water Quality Control Board

Los Angeles Region



Linda S. Adams
Cal/EPA Secretary

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: <http://www.waterboards.ca.gov/losangeles>

Arnold Schwarzenegger
Governor

February 11, 2010

Mr. Don Schmitz
Schmitz and Associates, Inc.
29350 West Pacific Coast Highway, Suite 12
Malibu, CA 90265

Dear Mr. Schmitz:

WASTE DISCHARGE REQUIREMENTS PROHIBITING DISCHARGE FOR MALIBU LA PAZ RANCH AT 3700 LA PAZ LANE, MALIBU CALIFORNIA (File No. 08-101)

Our letter dated January 25, 2010 transmitted revised tentative Order for Waste Discharge Requirements for the Malibu La Paz Ranch located on 15 acres at 3700 La Paz Lane in the City of Malibu.

Pursuant to Division 7 of the California Water Code, this Regional Board at a public meeting held on February 4, 2010, reviewed these tentative WDRs, considered all factors in the case, and adopted WDRs Order No. R4-2010-0022 (copy enclosed) relative to this discharge.

Any person aggrieved by this action of the Regional Board may petition the State Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality/index.shtml or will be provided upon request. "

We are sending the WDRs to the Discharger (Malibu La Paz LLC) only. For recipients on the mailing list, an electronic or hard copy of these enclosures will be furnished upon request. Should you have any questions or need additional information, please call the Project Manager, Ms. Elizabeth Erickson, at (213) 620-2264, or the Unit Chief, Dr. Rebecca Chou, at (213) 620-6156.

Sincerely,

Wendy Phillips, Chief
Groundwater Permitting and Landfills Section

Enclosure: Order R4-2010-0022

California Environmental Protection Agency



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Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

Mr. Don Schmitz
Malibu La Paz

- 2 -

February 11, 2010

cc: Mr. Craig George, Mr. Andrew Sheldon, Mr. Jim Thorsen, City of Malibu
Mr. Chris Deleau, Schmitz and Associates, Inc.
Ms. Tamar C. Stein, Cox Castle
Mr. Pio Lombardo, Lombardo and Associates
Mr. Chi Diep, CA Public Health, Drinking Water Program
Mr. Mark Pestrella, County of Los Angeles, Department of Public Works
Mr. Carlos Borja, County of Los Angeles, Cross Connections
Ms. Tatiana Gaur, Santa Monica Baykeeper
Dr. Mark Gold, Heal the Bay
Mr. Michael Blum, Malibu Surfing Association
Ms. Rhiannon L. Bailard, Pepperdine University

California Environmental Protection Agency



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Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

**State of California
California Regional Water Quality Control Board, Los Angeles Region**

**Order No. R4-2010-022
Specifying Waste Discharge Requirements
Prohibiting Discharge
From the Malibu La Paz Ranch, LLC**

File No. 08-101

WHEREAS, the California Regional Water Quality Control Board, Los Angeles Region, finds that:

Findings

1. On December 22, 2006, Malibu La Paz LLC ("La Paz" or "applicant") submitted an incomplete Application/Report of Waste Discharge ("ROWD") to the California Regional Water Quality Control Board for the Los Angeles Region ("Regional Board"). The ROWD described a proposed project that would support offices, retail stores, and restaurants, in seven buildings totaling approximately 100,000 square feet on 15 acres at 3700 La Paz Lane (Parcels A (APN # 4458-022-023) and B (APN #4458-022-024) in the City of Malibu.
2. In the engineering materials submitted with the ROWD dated December 22, 2006, the applicant proposed a treatment system with fixed activated sludge and disinfection using chlorine, with disposal capacity of 30,000 gallons per day (gpd) through: (a) discharge of 22,500 gpd to groundwater via leachfields, and (b) reuse of 7,500 gpd for spray irrigation. The applicant's proposal also included storage of 50,000 gpd to hold the treated wastewater during 38 to 90 days when evapotranspiration rates were too low to justify irrigation.
3. In the 31 months following the initial incomplete ROWD on March 2, 2007, the applicant changed its design and operating approach and revised the ROWD in supplemental submittals.
 - a. On March 2, 2007, in response to notification from staff, the applicant submitted \$900, as the application fee was missing from the December 22, 2006 ROWD.
 - b. In late 2007, the applicant switched engineering consultants.
 - c. On January 8, 2008, the applicant's new engineering consultant met with staff to provide a briefing on a 'no-net-discharge' design with significant deviations from the treatment and disposal systems proposed in the initial ROWD. Included in submittals over the next five days was a preliminary design for the addition of ultraviolet disinfection, and a lowered estimate of wastewater flow from the proposed development, from 30,000 gpd to 21,000 gpd, and a groundwater extraction system to control mounding on the site.

February 4, 2010

- d. On December 2, 2008, the applicant advised staff that the City of Malibu overrode comments from the Regional Board in certifying an environmental impact report on the applicant's project on November 10, 2008.
 - e. On December 11, 2008, the applicant's representative testified before the Regional Board that the applicant's ROWD would recycle all wastewater generated on site.
 - f. On April 21, 2009, the applicant and staff from the Regional Board, California Department of Public Health (DPH), County of Los Angeles Department of Health Services, and the City of Malibu met, with the objectives of clarifying the applicant's current proposal, coordinating interagency requirements, and clarifying the status of the ROWD.
 - g. On May 14, 2009, the applicant submitted an engineering plan to supplement its ROWD, including an increase in flow to 37,000 gpd and included groundwater discharge through a leachfield. However, the applicant's submittal did not respond to all of staff's concerns expressed at the meeting on April 21, 2009.
4. Between March 2, 2007 and May 14, 2009, staff provided formal and informal comments to the applicant, among which include:
- a. November 5, 2007: letter documenting comments provided to the applicant and the City of Malibu on June 28, July 27, August 27, September 27, and October 29, 2007.
 - b. January 15, 2008: letter to La Paz, stating that the January 10, 2008 ROWD is incomplete.
 - c. February 15, 2008 to June 11, 2008: letters setting forth the deficiencies in the ROWD, including a request that the applicant address the basin-wide concern that insufficient assimilative capacity remained in the aquifer for the new project, existing discharges treated in a future centralized facility and forthcoming the Legacy Park stormwater facility.
 - d. June 11, 2008: letter to La Paz stating that preparation of the WDRs can be considered once CEQA is approved by the City of Malibu and the ROWD is complete.
 - e. February 23, 2009 and March 11, 2009: letters from staff notifying La Paz that the ROWD remained incomplete.
 - f. March 26, 2009: e-mail to Lombardo and Associates (applicant's consultant), listing missing items.
 - g. April 21, 2009: comments provided by staff during a meeting, including, among others, (i) the proposal did not appear to be a 'zero discharge' project (the project is expected to result in a rise in the water table), (ii) the engineering report needed further design development; and (iii) a proposed provision for emergency discharge would not be protective of water quality.
 - h. July 2, 2009: letter notifying La Paz that the May 14, 2009 ROWD remained incomplete.

In addition, staff engaged in numerous additional meetings, e-mail exchanges, and phone calls with the applicant and the applicant's representatives.

5. On July 23, 2009, DPH approved a report submitted by the applicant (intended to comply with title 22, California Code of Regulations), which contained a conceptual engineering design for the water reuse component for the proposed development. DPH conditioned the approval on, among other conditions, (a) submission of additional engineering details on the plumbing design, operation of the disinfection system, and development of recycling rules and requirements for tenants reusing the treated wastewater; and (b) approval by the Regional Board, as DPH's purview is limited to reuse of the treated wastewater in a manner protective of public health, and does not extend to protection of beneficial uses of state water resources.
6. On July 23, 2009, La Paz filed a petition with the State Water Resources Control Board (State Board), asking the State Board to confirm that La Paz's application has been deemed approved as a matter of law. La Paz alleged that it followed all of the requirements of the Permit Streamlining Act, Government Code section 65920, et seq. and that La Paz's ROWD and Application is "deemed approved" by operation of law on August 31, 2009. In the alternative, La Paz asked the State Board to schedule a hearing on the merits of its ROWD. The Regional Board filed a response contesting La Paz's assertions.
7. California Water Code section 13263, subdivision (a) specifies the requirements for discharge: "The regional board, after necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system, with relation to the conditions existing in the disposal area or receiving water upon, or into which the discharge is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."
8. In the *Water Quality Control Plan for the Coastal Watersheds of Los Angeles and Ventura Counties* (hereafter *Basin Plan*), the Regional Board designated beneficial uses and established water quality objectives for groundwater in the Malibu Valley Groundwater Basin and nearby surface waters:
 - a. Groundwater: Municipal and Domestic Supply (Potential), Industrial Process and Service Supply, and Agricultural Supply.
 - b. Malibu Lagoon: Navigation; Water Contact Recreation; Non-contact Water Recreation; Estuarine Habitat; Marine Habitat; Wildlife Habitat; Rare, Threatened, or Endangered Species Habitat; Migration of Aquatic Organisms; Spawning, Reproduction, and/or Early Development; Wetland Habitat.
 - c. Malibu Creek: Water Contact Recreation; Non-contact Water Recreation; Warm Freshwater Habitat; Cold Freshwater Habitat; Wildlife Habitat; Rare, Threatened, or

Endangered Species Habitat; Migration of Aquatic Organisms; Spawning, Reproduction, and/or Early Development; Wetland Habitat.

- d. Malibu Beach and Malibu Lagoon Beach (Surfrider Beach), Amarillo Beach, and Carbon Beach: Navigation; Water Contact Recreation; Non-contact Water Recreation; Commercial and Sport Fishing; Marine Habitat; Wildlife Habitat; Spawning, Reproduction, and/or Early Development; and Shellfish Harvesting.
9. California Water Code section 13243 states that a regional board, in a water quality control plan or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.
 10. On November 5, 2009, the Regional Board adopted Resolution No. R4-2009-007, amending the *Basin Plan* to prohibit discharges from onsite wastewater disposal systems in the Malibu Civic Center area, as defined by that *Basin Plan* amendment. The applicant's proposed discharge is within the boundaries of the prohibition, and is subject to the prohibition on new discharges of waste. While the *Basin Plan* amendment is not a final regulation in that it still requires the approval of the State Board and the Office of Administrative Law, it is a clear and recent statement of policy and intent by the Regional Board with respect to the Malibu Civic Center. While not yet operative, the regulation is an appropriate matter for the Regional Board to consider in determining how to address the instant permit proceeding, and the Regional Board may appropriately consider it for purposes of consistency and the furtherance of regional policy.
 11. Furthermore, the applicant's proposed discharge could affect nearby surface waters that are subject to total maximum daily loads (TMDLs) as described below:
 - a. Malibu Creek Watershed Nutrient TMDL: The US EPA, on March 21, 2003, specified a numeric target of 1.0 mg/l for total nitrogen during summer months (April 15 to November 15) and a numeric target of 8.0 mg/L for total nitrogen during winter months (November 16 to April 14). Significant sources of the nutrient pollutants include discharges of wastewaters from commercial, public, and residential land use activities. The TMDL specifies a load allocation for on-site wastewater disposal systems of 6 lbs/day during the summer months and 8 mg/L during winter months.
 - b. Malibu Creek and Lagoon Bacteria TMDL: The Regional Board specified numeric targets, effective January 24, 2006, based on single sample and geometric mean bacteria water quality objectives in the Basin Plan to protect the water contact recreation use. Sources of bacteria loading include storm water runoff, dry-weather runoff, on-site wastewater disposal systems, and animal wastes. The TMDL specifies load allocations for on-site wastewater disposal systems equal to the allowable number of exceedance days of the numeric targets. There are no allowable exceedance days of the geometric mean numeric targets. For the single sample numeric targets, based on daily sampling, in summer (April 1 to October 31), there are no allowable exceedance days, in winter dry weather (November 1 to March 31), there are three allowable exceedances days, and in wet weather (defined as days with

≥ 0.1 and the three days following the rain event), there are 17 allowable exceedance days.

- c. Santa Monica Bay Beaches Wet and Dry Bacteria TMDL: For beaches along the Santa Monica Bay impaired by bacteria in dry and wet weather, the Regional Board specified numeric targets, effective July 15, 2003, based on the single sample and geometric mean bacteria water quality objectives in the Basin Plan to protect the water contact recreation use. The dry weather TMDL identified the sources of bacteria loading as dry-weather urban runoff, natural source runoff and groundwater. The wet weather TMDL identified stormwater runoff as a major source. The TMDLs did not provide load allocations for on-site wastewater disposal systems, meaning that no exceedances of the numeric targets are permissible as a result of discharges from non-point sources, including on-site wastewater disposal systems. There are no allowable exceedance days of the geometric mean numeric targets. For the single sample numeric targets, based on daily sampling, in summer (April 1 to October 31), there are no allowable exceedance days, in winter dry weather (November 1 to March 31), there are three allowable exceedance days, and in wet weather (defined as days with ≥ 0.1 and the three days following the rain event), there are 17 allowable exceedance days.

12. California Water Code section 13263, subdivision (g) states that no discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into the waters of the state are privileges, not rights.
13. La Paz' ROWD was not deemed approved, and La Paz is not entitled to discharge, as a matter of law pursuant to Government Code section 65956 because La Paz has failed to provide a complete Report of Waste Discharge, the result of which is the inability of the Regional Board to prepare Waste Discharge Requirements that would allow the La Paz project to discharge wastewater. Regional Board staff advised La Paz in writing on January 15, February 15, and June 11, 2008 that its ROWD was incomplete, and specified the additional materials required for a complete application. Those letters also noted that La Paz' environmental impact report had not yet been certified. La Paz contends that the certification of its environmental impact report, and its notice to the Regional Board to that effect on December 2, 2008 triggered a new obligation by the Regional Board to send a new notice of incomplete application, notwithstanding that La Paz did not submit the previously requested materials. La Paz contends that 60 days after its public notice pursuant to Government Code section 65956, subdivision (b), its application was deemed approved (also pursuant to Government Code section 65956(b)).
14. Government Code section 65965, subdivision (c) states that failure of an applicant to submit complete or adequate information pursuant to the Permit Streamlining Act may constitute grounds for disapproving a development project.
15. Title 23, California Code of Regulations, section 2208, subdivision (a) states that whenever a project is deemed approved pursuant to Government Code section 65956 (of

the Permit Streamlining Act), the applicant may discharge waste as proposed in the ROWD until such time as the regional board adopts waste discharge requirements applicable thereto. No such discharge of waste shall create a vested right to continue such discharge. Furthermore, subdivision (b) of that section requires adoption of waste discharge requirements for any project deemed approved, "as soon as possible".

16. While the Regional Board does not believe La Paz application has been deemed approved, the Regional Board is aware of the petition referenced in Finding 6, above, and La Paz' claim to the contrary. Adoption of waste discharge requirements will therefore clarify the intent of the Regional Board with respect to the discharge requirements sought in La Paz' ROWD, and the requirements La Paz is obligated to meet.
17. The prohibition referred to in Finding 10 above contains a provision that allows "existing on-site wastewater disposal systems" in commercial areas six years to continue to use their existing systems before complying with the prohibition. The Regional Board believes that La Paz desires by its petition to the State Board (Finding 6) to obtain a determination that its discharges are already entitled, and therefore allow a claim that La Paz' system is an "existing on-site wastewater disposal system", entitled to operate until November 5, 2015. Notwithstanding the outcome of either proceeding, La Paz' system is not existing or operating. The prohibition's "grandfather" provision therefore would not apply to La Paz even if its discharges were entitled.
18. Alternatively, La Paz' intent may be to assert a claim that its permit should be considered as one of the class of projects with pending applications, which have been deemed existing under the prohibition. La Paz is not within that class. That class of projects is exclusively residential, and in any event, all projects that are members of that class were expressly identified in the prohibition. La Paz is not among them.
19. The Regional Board believes it would be both inconsistent with the intent of the prohibition, and would constitute a waste of resources to allow individual dischargers to construct systems that the Regional Board has determined should be phased out immediately.
20. With respect to the incomplete ROWD submitted by La Paz, the Regional Board has taken into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, and the need to prevent nuisance.
21. The Regional Board also has considered the provisions of Water Code section 13241 and the relevant water quality control plans that have been adopted.
22. La Paz has failed to provide a complete Report of Waste Discharge, the result of which is the inability of the Regional Board to prepare Waste Discharge Requirements that would allow the La Paz project to discharge wastewater.
23. Staff provided adequate response to the ROWD and modifications submitted by La Paz.

24. As currently proposed, La Paz cannot discharge waste without impairing the water quality of the Malibu Valley Groundwater Basin, or creating a nuisance.
25. Further, there are existing and continuing violations of State and Regional Board water quality standards in the City of Malibu that were addressed by the Regional Board in its November 5, 2009 *Basin Plan* amendment adopting a prohibition of wastewater discharges from onsite wastewater disposal systems. That prohibition applies to the La Paz project.
26. La Paz failed to submit a complete and adequate ROWD, which demonstrates that the proposed recycling project would meet water quality objectives in the *Basin Plan* that are protective of beneficial uses designated by the Regional Board for groundwater and nearby surface waters.
27. Issuance of waste discharge requirements for the La Paz project, as currently proposed, would not be protective of beneficial uses in the Malibu Valley Groundwater Basin and nearby surface waters.

THEREFORE, IT IS ORDERED that:

- A. The Regional Board hereby issues Waste Discharge Requirements to La Paz. The sole requirement in these Waste Discharge Requirements is that that La Paz is prohibited from discharging waste from its project, as described in the current ROWD.
- B. This Order is adopted without prejudice to La Paz filing another Report of Waste Discharge for its project for consideration by the Regional Board, subject to the requirements and prohibitions of the Basin Plan and of all other statutes, regulations, ordinances and laws.

I, Tracy J. Egoscue, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Los Angeles Region, on February 4, 2010.

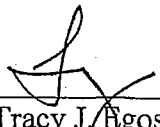

Tracy J. Egoscue
Executive Officer

EXHIBIT 2



MARK B HORTON, MD, MSPH
Director

State of California—Health and Human Services Agency
California Department of Public Health



ARNOLD SCHWARZENEGGER
Governor

July 23, 2009

Ms. Tracy Egoscue, Executive Officer
California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

**SYSTEM NO. 1990020 – MALIBU LA PAZ DEVELOPMENT ENGINEERING REPORT
FOR THE PRODUCTION, DISTRIBUTION AND USE OF TITLE 22 DISINFECTED
TERTIARY RECYCLED WATER**

Dear Ms. Egoscue:

The Department of Public Health – Drinking Water Program (Department) has reviewed the Malibu La Paz Development Engineering Report for the Production, Distribution and Use of Title 22 Disinfected Tertiary Recycled Water (Report), dated May 6, 2009, describing the treatment and reuse of disinfected tertiary recycled water for the La Paz Development in the City of Malibu. The Report follows the Department's guideline for developing a recycled water engineering report and the proposed wastewater treatment technology described in the Report is an accepted treatment technology by the Department. Therefore, the Department recommends the approval of the Report with the following conditions:

- Under the Memorandum of Agreement signed in 1996 between the Department and the State Water Resources Control Board (SWRCB), representing itself and nine California Regional Water Quality Control Boards (CRWQCB), the Department evaluates and makes recommendations to the SWRCB regarding recycled water projects. This evaluation of the Report is based only on the Department's requirements. The project proponent must obtain final approval for the Report from the CRWQCB – Los Angeles Region.
- The Department understands that the wastewater treatment system at the La Paz Development has not been constructed. Therefore, this recommendation for approval is only for the engineering report that was submitted. The project proponent should obtain final approval after the treatment system has been constructed, tested, and inspected.

Southern California Drinking Water Field Operations Branch, Southern California Section
1449 West Temple St., Room 202, Los Angeles, CA 90026
Telephone: (213)580-5723 Fax: (213)580-5711
Internet Address: www.cdph.ca.gov

- As indicated in the Report, a HiPOx ozone disinfection system will be used as the primary disinfectant. However, the Report did not include a dosage calculation that shows how the HiPOx system would meet the disinfection requirement. The project proponent should include a section on determining dosage that would meet the requirement in Section 60301.230(a)(2) of the California Code of Regulations.
- The Report has indicated that a UV disinfection system would be used as a backup disinfection system and could be the primary disinfection when the HiPOx system is out of service. If UV disinfection will be the primary disinfection, even for a limited time, the project proponent should validate the UV system or obtain a validated UV system accepted by the Department.
- The Report indicates that there will be dual plumbed buildings in the La Paz Development. However, the plumbing design for these buildings has not been completed. The project proponent should submit an amendment to the Report for dual plumbed buildings that would include the following information:
 - o A detailed description of the intended use area identifying the following:
 - The number, location, and type of facilities within the use area proposing to use dual plumbed systems,
 - The average number of persons estimated to be served by each facility on a daily basis,
 - The specific boundaries of the proposed use area including a map showing the location of each facility to be served,
 - The person or persons responsible for operation of the dual plumbed system at each facility, and
 - The specific use to be made of the recycled water at each facility.
 - o Plans and specifications describing the following:
 - Proposed piping system to be used,
 - Pipe locations of both the recycled and potable systems,
 - Type and location of the outlets and plumbing fixtures that will be accessible to the public, and
 - The methods and devices to be used to prevent backflow of recycled water into the public water system.
- The La Paz Development will consist of multiple buildings for offices, retailers, and restaurants and the property owner will be the producer, distributor, and user of the recycled water. The project proponent should establish rules/requirements on the safe usage of recycled water or include such information in tenant's

Ms. Tracy Egoscue

July 23, 2009

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contractual agreements. These documents should be submitted to the Department for review.

- As the La Paz Development progresses, the project proponent should also obtain approval from the Los Angeles County Department of Public Health (LACDPH) for on-site plumbing. LACDPH will perform an internal cross-connection evaluation.

If you have questions regarding this letter, please contact Mr. Chi Diep at (213) 580-5727 or myself at (213) 580-3127.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stefan Cajina', with a horizontal line extending to the right.

Stefan Cajina, P.E.
District Engineer
Central District

Ms. Tracy Egoscue
July 23, 2009
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cc: Elizabeth Erickson
California Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013 CA Regional

Chris Deleau
La Paz Ranch, LLC
c/o Schmitz & Associates, Inc.
5234 Chesebro Rd, Suite 200
Agoura Hills, CA 91301

Andrew Sheldon
Environmental Health Administrator
City of Malibu
23815 Stuart Ranch Road
Malibu, California 90265

Pio Lombardo
Lombardo Associates, Inc.
49 Edge Hill Road
Newton, MA 02467

Carlos Borja
Cross-Connections & Water Pollution Control Program
5050 Commerce Drive, Rm. 116
Baldwin Park, CA 91706-1423

EXHIBIT 3

January 19, 2010

Ms. Wendy Phillips
California Regional Water Quality Control Board (CARWQCB)
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Re: December 17, 2009 Tentative Order for Issuance of
Waste Discharge Requirements Prohibiting Discharge Malibu La Paz, 3700 La Paz
Lane, Malibu, CA File No. 08-101

Dear Ms. Phillips:

On behalf of Malibu La Paz Ranch ("La Paz" or "Applicant"), LLC, Schmitz & Associates, Inc. ("Schmitz") submits the following comments in response to the Los Angeles Regional Water Quality Control Board ("Board") December 17, 2009 Tentative Order for Issuance of Waste Discharge Requirements Prohibiting Discharge at Malibu La Paz, 3700 La Paz Lane, Malibu, CA 90265 (File No. 08-0101). This response has been prepared in conjunction with La Paz's Wastewater Engineer, Lombardo Associates, Inc.

As explained below, the Tentative Order is incomplete and misleading. The responses below are numbered to correspond to the numbered paragraphs in the Tentative Order.

1. On December 22, 2006, Malibu La Paz LLC ("La Paz" or "applicant") submitted an incomplete Application/Report of Waste Discharge ("ROWD") to the California Regional Water Quality Control Board for the Los Angeles Region ("Regional Board"). The ROWD described a proposed project that would support offices, retail stores, and restaurants, in seven buildings totaling 112,508 square feet on 15 acres at 3700 La Paz Lane in the City of Malibu.

1. The Tentative Order misstates the contents of La Paz's application and original submittal. On December 22, 2006 Schmitz employee, Matthew Dzurec, submitted on behalf of the applicant, an application for a Report of Waste Discharge ("Application") to the Los Angeles Regional Water Quality Control Board. The application concerned two separate proposed projects (.15 Floor Area Ratio ("FAR") Project and the .20 FAR Project). Both projects were similar in nature and proposed similar treatment methods and discharge volumes; plans were submitted to the Board for both projects on December 22, 2006. The Board states incorrectly in paragraph 1 of its findings that only one project was proposed for a 112, 058 sq. ft commercial development. La Paz has never submitted an application for 112, 058 sq. ft. of proposed development. La Paz's .15 FAR project proposed 99,117 sq. ft. of commercial retail and office space while La Paz's .20 FAR project iteration proposed 132, 058 sq. ft. of commercial retail and office development.



PROVIDERS OF WASTEWATER TREATMENT
FOR A BETTER COMMUNITY

HEADQUARTERS - MALIBU OFFICE
29350 PACIFIC COAST HWY., SUITE 12
MALIBU, CA 90265

TEL: 310.589.0773 FAX: 310.589.0353

EMAIL: INFO@SCHMITZANDASSOCIATES.NET WEBSITE: WWW.SCHMITZANDASSOCIATES.COM

SCHMITZ & ASSOCIATES, INC.

REGIONAL - CONEJO VALLEY OFFICE

5234 CHESEBRO ROAD, SUITE 200

AGOURA HILLS, CA 91301

TEL: 818.338.3636 FAX: 818.338.3423

The Board also states inaccurately that La Paz submitted an "incomplete" application to the Board. After submitting its application to the Board the applicant did not receive a written response to its application for over a year from the date of submittal. In fact, the applicant did not receive any form of communication from the Board regarding its application until February 28, 2007 when Schmitz employee Matt Dzurec received a phone call from Board staff member Rod Nelson requesting only that the applicant provide the Board with a \$900 check for processing fees.

2. In the engineering materials submitted with the December 22, 2006 ROWD, the applicant proposed a treatment system with fixed activated sludge and disinfection using chlorine, with disposal capacity of 30,000 gallons per day (gpd) through: (a) discharge of 22,500 gpd to groundwater via leachfields, and (b) reuse of 7,500 gpd for spray irrigation of on-site landscaping. The applicant's proposal also included storage of 50,000 gpd to hold the treated wastewater during 38 to 90 days when irrigation would not be appropriate.

2. This paragraph mischaracterizes the design and function of La Paz's original proposed wastewater system (Ensitu Engineering design). La Paz's original 2006 Application did not propose spray irrigation as is stated. Spray irrigation with reclaimed effluent would require the approval of a Title 22 compliant Wastewater Treatment Facility by the California Department of Public Health ("CADPH") and no such facility was proposed in the December 22, 2006 application. In fact La Paz originally proposed to dispose of all of its effluent through drip irrigation (Geoflow©) at approximately one foot below grade. La Paz's wastewater engineer at that time, Ensitu Engineering, posited that much of the treated effluent that would be dispersed through the drip irrigation would be evapotranspired by plant root uptake thus minimizing the amount of treated wastewater that would enter the groundwater. The engineer designed the system in accordance with standard engineering practices and factors of safety to accommodate peak flows of up to 36,220 GPD (.20 Preferred Project) and 29,620 GPD for the smaller .15 FAR project iteration (alternative project). Ensitu found that average (actual) daily effluent flows would be 7500 GPD. Hence, the 7500 GPD figure reflects the actual wastewater flows predicted to be dispersed (via drip irrigation only) on site. The original application proposed to utilize 5 "infiltrator chambers" only in the event that soil horizon leaching would not be appropriate (i.e., where wet weather made soil horizon leaching inadvisable and where the applicant's proposed 50,000 gallon effluent storage tank was full.) In other words, the applicant did not propose to discharge effluent to the more conventional leach fields (infiltrator chambers) until it was absolutely necessary. Board comments stating that the applicant proposed the "discharge of 22,500 gpd to groundwater via leach fields, and reuse of 7,500 gpd for spray irrigation of onsite landscaping" is therefore entirely inaccurate.

3. In the 31 months following the initial incomplete ROWD on March 2, 2007, the applicant changed its design and operating approach and revised the ROWD in many supplemental submittals.

3. Once again the Board never claimed the application was incomplete until January 15, 2008 (over one year after submittal) and no request was made by the Board to the applicant (in 2007) for additional materials. The timeline in this paragraph is missing many key dates and much significant information which are as follows:

- Between February 28, 2007 and April 12, 2007, Schmitz made several attempts by telephone and email to contact Board staff to obtain a filing determination for its application. There were several discussions with Board staff wherein they advised of their current workload and processing backlogs, but no filing determination was provided by Board staff.
- On April 12, 2007, Board staff member Toni Calloway left a telephone message for Schmitz Associate Planner Steven Reyes stating that two new engineers were to be hired by the Board next week and at that time La Paz's application would be assigned to a staff member for review.
- In early May of 2007, Board staff member Wendy Phillips informed Associate Planner Steve Reyes by telephone that Board staff would not process La Paz's application until La Paz had received California Environmental Quality Act ("CEQA") approval from the City of Malibu.
- Following the May 2007 telephone conference with Board staff member Wendy Phillips, Schmitz contacted the Board multiple times in an effort to obtain further comment and direction from the Board. The Board advised that it would not offer further comment nor would it process the application until such time as the City of Malibu had completed the CEQA process and certified the Final Environmental Impact Report ("FEIR").
- On or about September 27, 2007 the City of Malibu circulated the La Paz Draft Environmental Impact Report ("DEIR") for review through the State Clearing House beginning the 45 day review period required by CEQA. The public review period ended on November 13, 2007. All responsible agencies including the Los Angeles Regional Water Quality Control Board were presented with copies of the DEIR for review and comment. The Board did not offer written comment during the 45 day review period.
- On October 29, 2007 Donald W. Schmitz II, AICP, representative of the applicant, participated in a telephone conference with Board staff members as well as representatives for the City of Malibu. Board staff raised concerns regarding potential cumulative impacts from other proposed development projects in the City of Malibu. The Board reiterated its comments in a letter dated November 7, 2007. The EIR responded to this comment letter¹.
- Board staff alleges plainly in its Tentative Order dated December 17, 2009 that *"In the 31 months following the initial incomplete ROWD on March 2, 2007, the applicant changed its design and operating approach and revised the ROWD in many supplemental submittals."* This characterization of La

• ¹ The FEIR, which was certified on November 10, 2008 by the City of Malibu addressed all of the Board's comments adequately including Board concerns regarding potential cumulative impacts from wastewater disposal. See also the court's decision in Santa Monica Baykeeper v. City of Malibu, et. al., Los Angeles Superior Court Case No BS118289; Oder Denying Writ issued December 21, 2009 wherein the court held that the La Paz Project would not have any cumulative impacts to water quality.

Paz's application implies that La Paz haphazardly modified its application thus causing delays to the processing thereof. La Paz objects to this characterization of events inasmuch as all project revisions were precipitated by comments from Board staff. Specifically, while La Paz maintains that its project wastewater treatment and disposal strategy never posed a cumulatively considerable impact as alleged by Board staff, La Paz, in response to concerns articulated by Board staff, voluntarily revised its approach in January of 2008 in submitting its "No discharge" Title 22 Wastewater Treatment Plant Design. This design was submitted to Board staff on January 8, 2008 for staff's consideration and in response to staff's stated concerns in their November 7, 2007 La Paz DEIR comment letter.

- On January 8, 2008, La Paz representatives met with Board staff on behalf of La Paz to discuss the No Discharge Wastewater Treatment Plant ("WWTP") Design as well as the status of La Paz's application. At that meeting, Executive Director Egoscue promised to expedite the processing of the new WWTP design which was submitted that same day. Executive Officer Egoscue stated that she and her staff were very enthusiastic about the prospect of La Paz's proposed No Discharge Title 22 wastewater system.
- On January 15, 2008 staff issued its first written notice of incomplete application filing (discussed further infra).
- From January 15, 2008 until February 15, 2008 the applicant's representatives met with and corresponded with Board staff in an effort to expedite its application. The applicant's representatives submitted additional materials and information requested by Board staff in an effort to complete its application for filing and expedite the matter for a hearing.
- February 15, 2008. The Board issues its second letter of incompleteness. The Board's February 15, 2008 letter Notification of Incomplete Application for Waste Discharge Requirements identifies five (5) issues that need to be addressed:
 1. A Title 22 Engineering Report with the California Department of Public Health (CDPH) must be approved before the ROWD will be finalized.
 2. The design must be modified to meet the plumbing code assumptions for water use even if the WDR/WRR is for lower discharge volumes, which has been performed.
 3. Documentation on the operation of existing irrigation systems must be provided to confirm the ET estimates.
 4. The waste discharge from the project must be accommodated in the subsurface after consideration of the discharges from Malibu Lumber, Legacy Park WWTP, and Legacy Park Storm water disposal in the worst case.
 5. You [applicant] must specify the odor control features.

- From February 15, 2008 until April 2, 2008 the applicant's representatives met in person with and coordinated via telephone and emails with Board staff members in an effort to provide all information requested by Board staff.
- April 1, 2008. The La Paz Development Wastewater Master Plan, dated April 1, 2008, was submitted to the Board on April 2, 2008 for review and comment. The April 1, 2008 Plan addressed the Board's February 15, 2008 letter (5) issues as follows:
 1. **Title 22 Engineering Report approval by CDPH.** La Paz disagreed as to the need for the CDPH Title 22 Engineering Report Approval at this stage of its project. La Paz advised the Board that Title 22 Engineering Report approval by the CDPH is performed after Construction Plans and Specifications are prepared. Notwithstanding La Paz's objection, La Paz requested and received CDPH approval of its Engineering Report on two separate occasions, with CDPH approval of the conceptual design on May 30, 2008 and CDPH approval of the Title 22 Engineering Report for the Production, Distribution and Use of Title 22 Disinfected Tertiary Recycled Water on July 23, 2009.
 2. **The treatment design must meet the plumbing code assumptions for water use.** La Paz modified its project treatment design to meet the plumbing code flows in accordance with Board staff's request to do so in its February 15, 2008 letter. The May 6, 2009 Title 22 Engineering Report provides for treatment of code flows as requested.
 3. **Documentation on existing irrigation systems to confirm the ET estimates.** La Paz disputed the need for this request as the ET estimates were developed using CA Department of Water Resources (DWR) published and industry standard techniques. As noted in a companion correspondence, we have provided the Board with a summary of 10 years of irrigation and ET information from the nearby (less than one mile) Pepperdine University Title 22 recycled water irrigation system and ET measurement facilities which substantiate the following significant matters:
 - a. ET in the Malibu Civic Center area is 120% of CIMIS data that was used as the basis of the La Paz wastewater Plan. The implications of this data is that the La Paz reuse system is conservatively designed, i.e., estimates on wastewater reuse for irrigation in La Paz's Title 22 Engineering Report are conservative.
 - b. Groundwater recharge occurring below irrigated areas is not materially different than in non-irrigated areas in the Malibu Civic Center. Consequently there is no basis upon which to find that any appreciable groundwater mounding impacts are likely to occur.
 4. **Project discharge accommodated in the sub-surface after consideration of the discharges from Malibu Lumber, Legacy Park WWTP, and Legacy Park Storm water disposal in the worst case.** La Paz has provided the Board with

a "Steady State Groundwater Study" with several addendums as well as the "Transient Modeling" requested by Board staff. La Paz's Title 22 Engineering Report contains all requisite modeling requested by the Board. This modeling demonstrates conclusively that both standard irrigation practices as well as any potential emergency discharge of off specification effluent will not have any appreciable or cumulatively considerable impact on groundwater levels. Conversely, any changes in groundwater conditions caused by others will not affect La Paz wastewater management.

5. Specify the odor control features. Contained within April 1, 2008 Master Plan.

- On May 2, 2008 Board staff member Elizabeth Erickson stated (via email correspondence) that receipt of conceptual approval from the CADPH would complete La Paz's *application*. In this email, Ms. Erickson also requested that two other Malibu development projects, i.e., the Malibu Lumber Yard and the Windsail development projects, receive only conceptual approval by CADPH of their proposed Title 22 Wastewater Treatment Plants prior to the Los Angeles Regional Water Quality Control Board issuing WDR/WRRs for those projects. Ms. Erickson clearly acknowledged that CADPH review and approval of the Final Title 22 Engineering Report for those projects would occur after permitting by the Board.
- Board staff failed to respond to the applicant's April 3, 2008 application submittal packet in writing within 30 days as required by the Permit Streamlining Act.
- On June 11, 2008 the applicant and its representatives received a letter from Board Executive Officer Tracy Egoscue stating that the Board will not complete La Paz's application for processing until such time as the Board has received evidence of CEQA review completion (i.e., a Notice of Decision of project approval and certification of the projects' EIR). This is the first time that the Board has presented in writing this reason for delaying permit processing.
- During the months of June and July of 2008 the City of Malibu and the CADPH conducted their reviews of the April 1, 2008 La Paz Engineering Report (submitted to the Board on April 3, 2008) and both agencies issued project concept review approvals.
- From July 2008 until November of 2008 the City of Malibu conducted multiple hearings to review the La Paz .15 and .20 Projects (Planning Commission Meetings and City Council hearings).
- On November 10, 2008 the City Council for the City of Malibu approved both Projects and certified the FEIR.
- On November 24, 2008 the City Council conducted a second reading of the ordinance which is intended to implement the Malibu La Paz Development

Agreement and associated project entitlements for the .20 Development Agreement Project. Shortly thereafter the City issued its Notice of Determination ("NOD") which was posted in the Los Angeles County Recorder's Office and submitted to the State Clearing House as required by Law.

- On December 2, 2008 Schmitz sent an email correspondence to Elizabeth Erickson, Board staff member, confirming that the project has been approved and the EIR certified; Schmitz, on behalf of the applicant, attached the NOD to the correspondence for both projects and stated that the project should now be considered "complete" for processing in accordance with the June 11, 2008 letter from the Executive Officer of the Board.
- Board staff did not respond to the applicant's December 2, 2008 submittal within 30 days as required by law. The application was deemed complete as a matter of law pursuant to the Permit Streamlining Act as of January 2, 2009. Board staff did not respond in writing to the applicant's December 2, 2008 correspondence until February 23, 2009.
- February 12, 2009: La Paz legal counsel Stanley Lamport, Esq. of Cox Castle & Nicholson sent a letter to the Board asserting that La Paz's application has been deemed complete as a matter of law pursuant to the Permit Streamlining Act.
- March 11, 2009: Jeffrey Ogata, Legal Counsel for the SWRCB responded to La Paz's legal Counsel's assertions denying that the application was in fact complete. The Board requested, inter alia, that La Paz prepare a Title 22 Engineering Report for the Production, Distribution and Use of Title 22 Disinfected Tertiary Recycled Water ("Title 22 Engineering Report") and associated engineering drawings and obtain final CADPH approval of the same before the Board can complete the application. No other similarly situated applicant has been asked to do this. This goes against standard policy which is to obtain final review and approval from CADPH after the Board issues the discharge permit with conditions (WDR/WRR). Mr. Ogata's statements are contrary to what Board staff had previously articulated to the applicant regarding CADPH processing as a prerequisite to application completion. As noted in the previously referenced May 2, 2008 email correspondence from Board staff member Elizabeth Erickson to Chi Diep at CADPH, only conceptual review from CADPH would be required to deem La Paz's application complete for processing.
- Notwithstanding La Paz's position that its application had been deemed complete and that final approval from the CADPH of its Title 22 Engineering Report was unnecessary to complete its WDR/WRR application, La Paz agreed to prepare the Title 22 Engineering Report and associated materials and submit the same to CADPH for its "final" approval. From March 11, 2009 to May 12, 2009 La Paz prepared engineering drawings to be used in its Title 22 Engineering Report which were sufficient to obtain final approval from CADPH. As previously noted, other similarly situated projects were not required to prepare engineering drawings prior to obtaining permit approval from the Board.

- On April 24, 2009 La Paz representatives met with Board staff to review La Paz's Title 22 Engineering Report and accompanying materials. Staff advised that La Paz would have to modify its Wastewater Treatment System Design in several respects or the Board would not process the project or complete the application. Specifically, during this meeting staff member Wendy Phillips stated for the first time that unless La Paz takes the following actions Board staff would not complete La Paz's application or schedule its permit matter for hearing: 1. Modify the ROWD to completely prohibit any and all discharge including any emergency discharge that may be required by Title 22 of the California Code of Regulations; 2. Agree to add a process of reverse osmosis to the system to remove salts from wastewater prior to reuse for irrigation; 3. Place lysimeters beneath the leach fields to measure wastewater discharge and; 4. Place several groundwater monitoring wells *off-site* at legacy park or on adjacent properties in an effort to ascertain any potential contribution that La Paz's system may have on adjacent properties (groundwater mounding). The requests to modify La Paz's design as specified by Board staff during the April 24, 2009 meeting were not previously requested of the applicant at any time prior to said meeting.
- On May 12, 2009 La Paz submitted its engineering report to the CADPH for final approval.
- On May 21, 2009 La Paz representatives received an email from Board staff member Elizabeth Erickson reiterating that the Board would not permit any discharge, emergency or otherwise by La Paz.
- On May 22, 2009 Tamar Stein, Esq., legal counsel for La Paz, responded to Ms. Erickson's email correspondence of May 21, 2009 stating that it was unlawful and otherwise inappropriate for Board staff to mandate that the applicant modify its wastewater treatment plant design as a prerequisite to the applicant receiving a hearing on its application or as a prerequisite to project approval.
- La Paz obtained FINAL approval of its Title 22 Engineering Report from the CADPH on July 23, 2009. This approval was transmitted to the Board on the same day it was received.
- On July 23, 2009 La Paz filed its petition with the State Water Resources Control Board ("State Board") for review of a failure of the Regional Board to act on its application. The petition is currently pending before the State Board (A-2036).
- La Paz subsequently followed all procedures required under the Permit Streamlining Act and notified the Board and the General Public that its application was deemed approved by operation of law. La Paz maintains that its application was deemed approved as of August 31, 2009 due to inaction by the Board on its application.

- On December 17, 2009 La Paz received notice that the Board intended to convene a hearing on February 4, 2010 to review La Paz's ROWD Application. It is La Paz's position that La Paz is currently permitted to discharge as a matter of law and that any action taken by the Board must be taken in compliance with §2208 of Title 23 of the California Code of Regulations regarding subsequent Board consideration of a permit matter previously approved as a matter of law in accordance with the Permit Streamlining Act and the Water Code.

- c. On January 10, 2008, the applicant's new engineering consultant met with staff to provide a briefing of significant deviations to the treatment and disposal systems proposed in the initial ROWD. Included in a submittal on that day was a preliminary design for the addition of ultraviolet disinfection, and a lowered estimate of wastewater flow from the proposed development, from 30,000 gpd to 21,000 gpd. The consultant also discussed a possible groundwater extraction system to control mounding on the site. Staff asked the consultant to provide clarification of the proposal for extracting groundwater, including disposal of the extracted groundwater, which would likely contain wastewater.

3(c): The applicant proposed groundwater extraction as one possible means of achieving a mass water balance. The feasibility of the applicant's design did not then and does not currently propose groundwater extraction; rather this was a topic the applicant wished to discuss with the Board staff. La Paz's Engineering Report adequately describes the manner in which it will achieve mass balance of a No Wastewater Discharge System.

- d. On December 2, 2008, the applicant advised staff that the City of Malibu overrode comments from the Regional Board in certifying an environmental impact report on the applicant's project on November 10, 2008.

3(d): The City responded adequately to the Board's comments in the Responses to Public Comments section of the FEIR for La Paz; it did not "override" comments by the Board as is stated in this paragraph.

- e. On December 11, 2008, the applicant's representative testified before the Regional Board that the applicant intended to modify the ROWD to recycle all wastewater generated on site.

(3)(e): First it is unclear to La Paz who the Board is referring to in this paragraph. Who is the "applicant's representative?" The applicant does not have a copy of the December 11, 2008 meeting minutes and cannot deny or confirm the precise comments made at that hearing; however the administrative record clearly demonstrates that from January 2008 until present the applicant has consistently proposed 100% recycling and reuse of its wastewater onsite (No Discharge). The applicant's submittals throughout 2008 demonstrate its intent to recycle all